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No. 01-213

In The

Supreme Court of the United States

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

Petitioner,

v.

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture, and MONTANA WILDERNESS ASSOCIATION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE FOREST SERVICE'S NO-LEASING DECISION IS NOT IMMUNE FROM JUDICIAL REVIEW.

Both Respondents and Intervenors argue that the Forest Service's no-leasing decision is entirely beyond judicial review because it is "committed to agency discretion by law." Rsp. 8-9; Int. 12, Nt. 8 (both citing 5 U.S.C. § 701(a)(2)). However, all agency action is reviewable absent "clear and convincing evidence" of contrary Congressional intent. Pet. 12-13 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)). The APA's judicial review exemption applies only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). The Mineral Leasing Act and NEPA both provide "meaningful standard[s] against which to judge the [Forest Service's] exercise of discretion." *Webster v. Doe*, 486 U.S. 592, 600 (1988). It is well established that parties who oppose oil and gas leasing are entitled to judicial review. *See, Wyoming Outdoor Council v. Dombeck*, 165 F.3d 43 (D.C. Cir. 1999). Thus, it is illogical for Respondents and Intervenors to suggest that those who are in favor of oil and gas leasing are not entitled to judicial review. In any event, this inconsistency raises an important question of federal law that "has not been, but should be, settled by this Court." S.Ct. Rule 10(c).[1]

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[1] Intervenors argue that *certiorari* should be denied because the Ninth Circuit's decision is unpublished, Int. 8-9, but that fact "carries no weight." *Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987). This Court regularly grants *certiorari* to resolve circuit court splits created by unpublished decisions or

II. THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS REGARDING ARTICLE III STANDING.

Under this Court's decision in *Bryant v. Yellen*, 447 U.S. 352 (1980), a party wrongfully denied an opportunity to bid for rights to valuable federal interests suffers an Article III "injury in fact." Pet. 14-15. Such parties have Article III standing even though they cannot "with certainty establish that they would be able to [secure rights to those interests]." *Id.* 15. Respondents ignore this clear legal standard arguing that "[b]ecause [IPAA] has no legal right to compel the federal government to issue a lease for particular forest lands, [IPAA] cannot establish a cognizable injury. . . . " Rsp. 8-9. Of course, the mere fact that the Forest Service's no-leasing decision was discretionary does not mean that IPAA is without Article III standing, Pet. 14-16, and contrary to Respondents" arguments, under *Bryant*, IPAA is not required to prove with absolute certainty that one or more of its 4,500 members would receive an oil and gas lease even though such a result is virtually certain. *Id.*

Respondents also argue that IPAA's injuries are not redressable because "a third-party not before the court, the Secretary of the Interior, exerts control over whether oil and gas leases are issued in the Rocky Mountain Division." Rsp. 11. However, IPAA need only show that its injuries are "likely" to be redressed by a favorable decision. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S.

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when a Circuit Court's unpublished decision conflicts with a decision of this Court. *See, Eastern Coal Corporation v. United Mine Workers of America District 17*, 531 U.S. 57, 61 (2000); *Harry Connick v. Myers*, 461 U.S. 138 (1982).

26, 38 (1976). The Forest Service's no-leasing decision forecloses any possibility of oil and gas development within the Rocky Mountain Division and places an absolute barrier to any IPAA member receiving a lease. If IPAA receives a favorable decision striking the no-leasing decision that absolute barrier will be removed. Thus, IPAA's injuries are indeed redressable. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 261 (1977).

Respondents also attempt to distinguish *Northeastern Florida Chapter of the Associated Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), merely because those cases involve equal protection claims. Rsp. 12. However, as this Court has held: "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Contrary to Respondents' arguments, the plaintiffs in *City of Jacksonville* and *Adarand* had standing not based on the nature of their substantive claims but, rather, based on their injuries in the form of the government's wrongful denial of the opportunity to bid for valuable government contracts, which injuries are identical to the injuries suffered by IPAA's members. Thus, like the plaintiffs in those cases, IPAA has Article III standing.

Respondents also argue that, because IPAA cannot compel the Forest Service to issue oil and gas leases, IPAA "cannot establish cognizable injury to its members from the Forest Service's decision not to lease those lands." Rsp. 8. In support of this argument Respondents cite *Region 8 Forest Serv. Timber Purchasers Council v.*

Alcock, 993 F.2d 800 (11th Cir. 1993). However, the Eleventh Circuit's holdings in *Region 8* flatly contradicts the Eighth Circuit's decision in *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984), where that court held that oil and gas companies had standing based on the wrongful denial of their rights:

> [1] to have the lands not classified arbitrarily, [2] to have the Secretary utilize his discretion properly, and the right [3] to bid for all properly categorized and offered . . . lands for potential profit and exploratory public benefit. . . . Moreover, a proper . . . determination will protect Arkla's interest [4] in having an opportunity to participate in a lawful bidding process. . . .

Id. at 353-54. In the case at bar, the Ninth Circuit sides with the Eleventh Circuit, expanding the growing split between circuits regarding standing to challenge discretionary decisions of the Forest Service. This Court should grant *certiorari* to address that obvious split.

III. THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE EIGHTH CIRCUIT REGARDING THE "ZONE OF INTERESTS" TEST.

Respondents argue that the "zone of interests" NEPA protects does not include the economic effects of agency decision making but, rather, is limited to "ensur[ing] that the government fully considers the environmental consequences of major federal actions." Rsp. 14. However, under the liberal "zone of interests" standards enunciated by this Court in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) and *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987),

"economic effects" are unquestionably part of the "quality of the human environment" that agencies must consider under NEPA. Pet. 21-23. Respondents cite *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), for the unremarkable proposition that NEPA is concerned with the "environmental consequences of a proposed project," Rsp. 14, which proposition, while true, does not address whether "environmental consequences" include economic effects of agency action. No language from *Robertson* distinguishes economic consequences from other environmental consequences; in fact, the *Robertson* decision affirms that economic benefits might outweigh other environmental considerations. *Id.* at 350-51. Thus, *Robertson* confirms that NEPA requires agencies to take a "hard look" at the economic impacts of the proposed action which impacts are an integral part of the "quality of the human environment." 42 U.S.C. § 4332(C).

Next, Respondents attempt to distinguish *Bennett v. Spear*, 520 U.S. 154 (1997), on the grounds that the Endangered Species Act (ESA) provision at issue in *Bennett* "had the objective of avoiding needless economic dislocation," while "the NEPA provision at issue here implements Congress's objective of ensuring that the government brings to light the environmental impacts of proposed action." Rsp. 14. However, like the ESA provision in *Bennett*, NEPA obligates federal agencies to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, *economic*, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added). Similarly, the CEQ regulations obligates federal agencies to analyze "economic" impacts that relate to any

potential effects on the natural or physical environment. 40 C.F.R. § 1508.14.

Respondents also argue that Section 4331 of NEPA "does not give rise to an actionable claim," yet, admit that Section 4332(C) of NEPA requires the Forest Service to take a "hard look" at all environmental impacts of a proposed major federal action, Rsp. 13-14, which "hard look" must include an analysis of significant economic impacts. Respondents cannot seriously argue that economic concerns are outside NEPA's zone of interest when the Forest Service analyzed the economic effects of oil and gas leasing within the Rocky Mountain Division in preparing its EIS. A.R. Vol. 145; Doc. 1, at IV-113 to IV-125. Likewise, Intervenors admit that, under *Bennett*, economic interests fall within an environmental statute's zone of interests if the plaintiff's suit is based on a particular provision that has an economic purpose. Int. 17, and the above provisions of NEPA each have an undeniable "economic purpose."

Finally, Intervenors admit that the Eighth Circuit's decision in *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999), creates an irreconcilable conflict with the case at bar because, in *Friends*, plaintiffs with purely economic interests were found to have prudential standing under NEPA. Rsp. 17-18. Respondents, on the other hand, argue that *Friends* can be distinguished because, allegedly, the petitioners' interests there were not "solely economic." Rsp. 15. However, this distinction is irrelevant because, in *Friends*, the Eight Circuit recognized the petitioners' standing based on their economic interests:

> the particular provisions relied on by the [petitioners] indicate that the social and *economic*

> effects of proposed agency action must also be considered once it is determined that the proposed agency action significantly affects the physical environment. . . . The regulations implementing NEPA mandate that the term "[h]uman environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.

Friends, at 1125 (emphasis added). The provisions the petitioners relied on in *Friends* are the very provisions IPAA relied on before the Ninth Circuit, yet, the Eighth Circuit held that the petitioners had prudential standing under NEPA claims while the Ninth Circuit held that IPAA had no prudential standing under NEPA. Pet. 24-25. Obviously, the two cases are irreconcilable and this Court should grant *certiorari* to address that conflict.

IV. THE NINTH CIRCUIT'S DECISION CREATES A CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS REGARDING WHETHER AGENCY DECISION MAKING MAY BE BASED ON ATTENUATED "PSYCHOLOGICAL HARMS."

Respondents deny that the Ninth Circuit's decision conflicts with this Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), because "effects on human health, including psychological health, are cognizable under NEPA." Rsp. 16. However, "psychological harms" are only cognizable under NEPA if they involve a "reasonably close causal relationship between a change in the physical environment and the effect at issue." *Metropolitan Edison*, 460 U.S. at 774. On that basis, this Court held that the petitioners' claims of "psychological health damage" were too attenuated

and existed "beyond the reach of NEPA." *Id.* at 775. Similarly, the psychological health concerns involved in the case at bar are merely "feelings" and "perceptions" about the "value and spirituality" of the Rocky Mountain Division, are also "beyond the reach of NEPA" and, therefore, cannot be the basis of an oil and gas leasing decision. Pet. 9. Oil and gas development could not negatively impact wildlife or surface resources because No Surface Occupancy (NSO) restrictions would prevent *any* physical disturbance whatsoever to the Rocky Mountain Division. Pet. 8. Likewise, the alleged risk of injury to "experiential and aesthetic" values, Int. 22, n.4, is nonexistent because the NSO restrictions would prevent any visible, aural, or other sensory impacts of oil and gas activities within the Rocky Mountain Division. The hypothetical "risk" of psychological harm upon which the Forest Service based its decision is precisely what this Court rejected in *Metropolitan Edison* and Respondents have failed to address that "critical distinction." 460 U.S. at 779 (Brennan, J., concurring). For the same reason, Respondents cannot distinguish the case at bar from decisions by the Second and Eighth Circuits striking claims that agency decisions may be based on allegations of "psychological harm," Pet. 27-28, and this Court should grant *certiorari* to address this conflict.

Respondents also argue that even if federal agencies are "not required" by NEPA to base decisions on "value and spirituality of [ ] place," NEPA "by no means forbids" an agency from basing its decisions on such intangible, subjective concerns. Rsp. 16. The Ninth Circuit's decision is in accord, App. 3, and would allow federal agencies to base countless, important NEPA decisions on

any subjective, emotional, or psychological criteria proffered by a party participating in the NEPA comment process. This specific argument has national significance and "has not been, but should be, settled by this Court. . . . " S. Ct. Rule 10(c).

Respondents also fail to cite any authority for their assertion that if agency decisions must be based solely upon the criteria in NEPA, "the government would be barred from considering all sorts of non-environmental impacts, such as national security, economic, or social impacts, even where such impacts might be the motivating policy rationale for a proposed action." Rsp. 16. First, obviously, policy rationales such as ensuring the Nation's security take precedence over any environmental concerns. However, in the absence of any such overriding policy rationale, federal agencies must base decisions about the use of valuable natural resources upon the criteria identified by NEPA. Second, rather than barring consideration of economic impacts, NEPA obligates federal agencies to consider the economic impacts of proposed actions. Pet. 23. Third, while federal agencies may consider "social impacts," one of which is economic impacts, there are clear limits on the types of social impacts upon which an agency may base its decisions, such as the limits against most types of "psychological injury" as set forth in *Metropolitan Edison*. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (citing *Stark v. Wickard*, 321 U.S. 288, 309-310 (1944)). Respondents fail to cite any authority that authorizes the Forest Service to set aside one of the largest single oil and

gas reserves within the continental United States to protect emotional and psychological concerns such as "value and spirituality of [ ] place." Pet. 9. This *ultra vires* expansion of authority is all the more egregious in light of the federal government's findings that "[a] fundamental imbalance between supply and demand defines our nation's energy crisis. . . . This imbalance, if allowed to continue, will inevitably undermine our economy, our standard of living, and our national security." *Report of the National Energy Policy Development Group*, at viii (May 2001).[2]

CONCLUSION

The Ninth Circuit's decision is in direct conflict with the decisions of this Court and the decisions of several Circuit Courts. This Court should grant *certiorari* to address these conflicts.

Respectfully submitted,

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[2] This *Report* may be located at http://www.whitehouse.gov/energy.